No. 10,187

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JULIA C. COLLINS and HATTIE L. MOSHER,
Appellants,

vs.

JOE O'CONNELL and JESSIE B. O'CONNELL
(husband and wife),
Appellees.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Without waiving the other points made in the opening brief the appellants will confine this reply brief to three salient features of appellees' answering brief.

I.

THE FIRST CONCERNS THE EFFECT OF THE DISMISSAL OF THE APPELLEES FROM THE FORECLOSURE SUIT UPON THE GERARD MORTGAGE.

Appellees admit in their brief (page 9) that if Julia C. Collins was in fact the owner of the Gerard Mortgage that the Ganz mortgage would then be merely a second mortgage.

The general rule is that when the first mortgage is foreclosed it is not essential to make the second mortgagees parties to the foreclosure suit.

> "While the practice in some jusidictions requires junior encumbrancers to be made parties, and in some jurisdictions they are given notice of the order, or judgment, for forecloure, the general rule is that a junior encumbrancer is not a necessary party to a suit by a senior mortgagee to foreclose in such a sense that his presence on the record is necessary to a valid decree, but it is always both proper and prudent to join him as a defendant, both to give him an opportunity to defend and to extinguish his right of redemption."
>
> 42 *C. J.*, page 57, Section 1580.

Since appellees were made at the inception parties to the foreclosure suit of Julia C. Collins it is clear that they had notice of the suit with the right to intervene and that the only other right which appellees could have would have been the right to redeem which has long since expired.

Appellees insist, however, that if Julia C. Collins was the owner of the Gerard Mortgage, then the appellees, as purchasers from Mrs. Ganz, were the owners of the land subject to the Gerard Mortgage.

It is difficult to see any reason why Mrs. Ganz, or her successors in interest, would have any greater right to be made parties by reason of their second mortgage than was the second mortgagee before the foreclosure suit to which the first mortgagee was not made a party. Whatever rights Mrs. Gans and her successors had after the foreclosure were derived nec-

essarily from the mortgage which was foreclosed. Since the first mortgagee was no party to the suit her rights could not be affected.

Finley v. U. S. Bank, 11 Wheat. 304, 6 L. ed. 480;

Atkins v. Volmer, 21 Fed. 699;

Young v. Montgomery, etc. R. Co., 30 F. Cas. No. 18,166, 2 Woods 606.

Since the appellees admit the title of Mrs. Ganz was subject to the Gerard Mortgage, if it was in truth the property of Julia C. Collins, it follows that upon the foreclosure of the Gerard Mortgage the rights of Mrs. Ganz were foreclosed, except the right of redemption, which was not exercised. Any other conclusion would allow the second mortgagee to enlarge her rights against the first mortgagee by virtue of a suit to which the first mortgagee was not a party.

However, even if the change in the status of Mrs. Ganz from second mortgagee to owner, subject to the Gerard Mortgage, would make it necessary to join Mrs. Ganz in order to remove her deed as a cloud upon the title, which we do not concede, it could not possibly affect the right of appellant, Julia C. Collins, to foreclose her prior right against the owner of the land and her Special Master's deed emanating from the first mortgage would necessarily take precedence over the deed resulting from the second mortgage leaving the latter but an empty shell and a mere cloud upon the title. A foreclosure suit unlike a conveyance from the owner can ripen into no greater title than that which was possessed by the person whose interests were fore-

closed. Since the interest of the appellant Mosher was subject to the Gerard Mortgage at the time of the foreclosure it follows that the only title conveyed by the Ganz deed was the equity of Mrs. Mosher over and above the Gerard Mortgage which equity was wiped out by the foreclosure of the Gerard Mortgage.

Moreover the Court will note that Julia C. Collins was the defendant in the Court below and there can be no question in this suit as to the doctrine of a multiplicity of suits preventing appellant from removing the cloud of appellees' claimed title. The matter is the other way around, it is the appellees who are trying to remove the deed of Julia C. Collins derived from a prior mortgage as a cloud upon their title. This it is quite clear the appellees cannot do under any view of the law.

II.

THE SECOND CONCERNS THE ARGUMENT THAT THERE WAS NO SUCH RECORDED INTEREST OF THE APPELLANT, AND ATTORNEY IN FACT, H. L. MOSHER, IN THE GERARD MORTGAGE AS TO INVALIDATE THE ASSIGNMENT MADE BY SAID H. L. MOSHER AS ATTORNEY IN FACT OF JULIA MOSHER COLLINS, DECEASED.

Appellees are compelled to admit that:

> "The principle that authority to the agent to do acts for his principal's benefit does not authorize him to do such acts where his own interest conflicts with his duty to his principal, is too well established to be questioned * * *"
>
> (Appellees' Brief, page 15.)

But appellees say that Mrs. Mosher had no interest in the mortgage in question.

Let us see what the record shows upon this point.

The mortgaged premises were deeded from Green and Griffin to Hattie L. Mosher on July 1, 1914. (T. of R. p. 210.) This deed was subject to the mortgage in question. See page 211:

> "* * * Warrant * * * the premises unto the said Hattie L. Mosher * * * Except a certain mortgage Dated * * * Recorded * * * in Book 85 of Mortgages at page 303. * * *"

This mortgage was extended on October 7, 1918 to February 24, 1928, and in this extension of mortgage we find the following:

> "Now, Therefore, in consideration of said extension, said Hattie L. Mosher agrees to pay said promissory note with the specified rate of interest thereon upon the 24th day of February, 1928."
>
> (T. of R., pages 180 and 215.)

All instruments were duly recorded.

How a greater interest could possibly appear of record is hard to imagine.

Mrs. Mosher was not only the record owner of the mortgaged premises but had even assumed and agreed to pay the promissory note upon which the Gerard Mortgage was based. Likewise Mrs. Mosher had procured the ten years' extension of the note and mortgage by an agreement to pay the same. (See R. page 180.) All duly recorded.

Appellees say:

> "Mrs. Mosher's interests were not affected by an assignment of this mortgage from her daughter to her son-in-law. Presumably the son-in-law would be more insistent upon collection than the daughter."
>
> (Appellees' Brief, page 15.)

We know of no such presumption.

Even if such a presumption did exist it would be rebutted by the actual facts as disclosed by the record.

Julia Mosher Collins died two months after the assignment was made. The mortgage would not have been subject to the control of Julia Mosher Collins, but to her executor, or administrator, in Oregon.

It is entirely clear that it would be easier for Mrs. Mosher to obtain the release of this mortgage upon a part of the premises without consideration than it would have been to obtain such a release from the fiduciary in charge of her daughter's estate. The probate laws would be thus evaded and the husband would be immediately and without legal expense vested with his wife's separate property.

Why should he not be generous under these conditions?

The record shows that the assignment recites a consideration of $9000.00 as paid. However, Mrs. Mosher testified that James Dean Collins did not even know about the assignment.

The recital of consideration is not even an essential part of the recorded instrument. All written instruments import a consideration.

It is not unusual that the true consideration is not shown in a conveyance. The assignment in question was not under oath and the recitation of consideration found therein would be merely hearsay. Clearly a purchaser has a right to rely upon the record so far as the conveyance itself is concerned, but the doctrine cannot be stretched to cover such collateral matters as the actual amount of consideration paid which is immaterial so far as the effectiveness of the conveyance is concerned.

Certainly if the whole assignment is voidable and subject to attack because of the recorded interest of the attorney in fact in the mortgage this would include such collateral matters as the mere recital of a fictitious consideration.

The record at the time of the execution of the Ganz mortgage affirmatively showed that the release of the Ganz mortgage from Lot 2, upon which the Ganz mortgage was afterwards placed, was wholly without consideration because the whole note and mortgage against the remaining property without any reduction whatever was assigned to A. B. C. Davenport. (Record, page 192.)

Surely a record showing upon its face that Mrs. Mosher had assigned a mortgage upon her own land, which she had assumed and agreed to pay, from her daughter to her son-in-law who purported to release part of the mortgage *without consideration* so that a new mortgage could be placed thereon by the very agent who executed the assignment would be a sufficiently suspicious circumstance to have put the mort-

gagee upon notice and inquiry which would immediately lead to the discovery of the death of Julia Mosher Collins and the very apparent reason for the assignment. Some sort of written ratification of the acts of Mrs. Mosher would have been the least which could have been required from Julia Mosher Collins or her estate.

The appellees correctly quote the law applicable to the present case from:

> 3 *Corpus Juris Secundum,* pages 184, 185, Section 253, as follows:
>
> "The principal is *not bound* by contracts made by his agent within his general scope of authority in which the agent has an individual interest adverse to that of the principal *when the contracting third party has notice of such interest;* but the rule is otherwise if the third party is not charged with such notice."

III.

THE THIRD POINT CONCERNS THE CLAIMED ADVERSE POSSESSION FOR A PERIOD OF FIVE YEARS.

The complaint clearly shows that it was brought upon the theory of actual adverse possession as contemplated in the Revised Code of Arizona of 1928, Section 2050.

However, Mr. O'Connell freely admitted that he held under a lease from Mrs. Mosher until the date of the Ganz deed to him which was recorded June 6, 1934. (T. of R., page 4, par. VI.) (See Reporter's Transcript, pages 78 and 79.)

Mr. O'Connell further admitted that the O'Connell Brothers, Incorporated, and not he, had the lease on the premises from Mrs. Mosher. He also admitted that O'Connell Brothers, Incorporated, were in possession of the land when the Ganz deed was given and still remain in possession. (T. of R. page 78.)

It was further conclusively shown by the admissions of Mr. O'Connell, himself, that the O'Connell Brothers are a separate and distinct entity from himself and Mr. O'Connell was conclusively impeached in so far as his claim to actual possession is concerned. (See entire cross-examination. Record, pages 78 to 81.)

Mr. Joe O'Connell, personally, has never even gone into possession of the premises at any time as conclusively shown by the evidence.

Faced with this complete failure of proof under Section 2050 under which the complaint was framed the appellees seek in their brief to uphold their title under Section 2052, Revised Code of Arizona, 1928.

The difficulty here, however, is even more insurmountable than under the original theory pursued by appellees.

Section 2052 requires that the owners must have paid the taxes thereon for five *consecutive* years next preceding the institution of the action.

The complaint was filed January 30, 1940. The deed from Mrs. Ganz was recorded June 6, 1934, while the lien for the taxes went on the land the first Monday in January, of 1934. (See Revised Statutes of 1913, Section 4845, on page 1563, which governs.) However, the

taxes were being paid by the O'Connell Brothers, in conformity with their lease, which has never been terminated. The Revised Statutes of 1913, paragraph 4711, page 1512, is very emphatic that:

> "When any person enters into the possession of real property under a lawful lease, he shall not while so in possession deny the title of his landlord in an action brought by such landlord, or any person claiming under him, to recover possession of the property." (Consolidated and Revised in R. C. 1928, Section 1954.)

The very receipts filed by appellees to prove payment of taxes conclusively show as to City and County taxes that they were not all paid by Mr. O'Connell and particularly that the County taxes for the last half of 1936 were paid by the O'Connell Brothers. Many receipts do not show who paid them; many do not show to whom assessed. The last half of the County taxes for 1936, were paid by the O'Connell Brothers April 29, 1937. There is no showing who paid the first half of 1937 nor the second half of 1938. The first half of 1938 was not paid until eleven (11) days after delinquency. The years of 1935, 1936, 1937, were assessed to Joe O'Connell. The County receipts do not show to whom the years of 1938 and 1939 were assessed.

As for the tax receipts for the City they show, out of the 17 payments claimed, that there were 14 payments delinquent when paid, while only 3 payments were made on time. Four City receipts do not show who paid them.

Moreover the record conclusively shows that Julia C. Collins had not been of age five years when the action was commenced.

Ignoring all oral testimony, the power of attorney filed by the appellees, page 185 of the T. of R., recites:

> "That I Julia Winifred Mosher Collins, formerly and until September 16th, 1914, Julia Winifred Mosher * * *"

That would place the fall of 1915 as the earliest date on which Mrs. Collins could have had a child, and there is nothing in the record to show that Julia C. Collins was the first child, only that she was the only child at the time of her mother's death. Five years allowed by law for the bringing of a suit added to the twenty-one (21) majority would be 26 years which added to 1915 would be the fall of 1941. The appellees filed their complaint alleging five years of possession and tax paying January 30, 1940. Section 707, page 389, of the Civil Code of the Revised Statutes of 1913, recites:

> (3) * * * and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this title."

Certainly the presumption would be that the granddaughter was not born until after the marriage which conclusively fixes her age at less than twenty-six (26) years at the commencement of this action. Section 2057, Revised Code of 1928, tolls the statute of limitations on real property until the prescribed period after the age of majority is attained.

It is needless to prolong this brief further on the question of adverse possession as it is clear that appellees' title must stand or fall upon the question of the ownership and status of the Gerard Mortgage and the various steps leading to the Special Master's deed flowing therefrom.

Dated, Portland, Oregon,
January 18, 1943.

Respectfully submitted,
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